

Michigan Supreme Court Adoption Work Group

Final Report
September 2, 2003

WORK GROUP HISTORY

On April 30, 2003, Michigan Supreme Court Chief Justice Maura D. Corrigan announced the formation of a work group to study ways to improve the adoption process in Michigan. The group, formed in cooperation with Family Independence Agency Director Nannette Bowler, was chaired by Karen Tighe, Chief Judge of the Bay County Probate Court, and retired Probate Judge Donna Morris of Midland. As finally constituted, the group also included:

- Judge Susan Dobrich, Chief Judge, Cass County Probate Court;
- Judge Mary Beth Kelly, Co-Chief Judge, Wayne County Circuit Court;
- Judge Susan Reck, Chief Judge, Livingston County Probate Court;
- Jean Hoffman, Director, Office of Child and Family, Family Independence Agency;
- Donna Mullins, Child Welfare Institute Field Supervisor, Family Independence Agency;
- Kathryn Fehrman, Deputy Director, Family Independence Agency; Service Delivery Administration;
- Robert Goldenbogan, Esq., Member, Foster Care Review Board Executive Committee;
- Lauran Howard, Esq., Oakland Circuit Court Family Division.

The work group discussed a wide-ranging array of issues regarding procedural obstacles to adoption in child protective proceedings and recommends measures to deal with them.

PROBLEM AREAS IDENTIFIED

Number of Children in Foster Care

Despite the efforts of the public and private agencies and the courts, substantial numbers of children remain in foster care as a result of child protective proceedings. As of July 31, 2003, there were 12,673 children who were temporary wards of the court as a result of protective proceedings, and a total of 19,490 children in foster care. At the end

of fiscal year 2002, Michigan had 4,615 permanent state wards with the goal of adoption. In that year, there were 2,833 finalized adoptions.

Compliance with Federal Mandates

One of the major challenges facing the courts in handling child protective proceedings is understanding and complying with the many requirements imposed by federal law, notably the Adoption and Safe Families Act, and related regulations. In addition, the federal government conducted a Child and Family Service Review to evaluate state compliance with various objectives regarding child and family issues. That review found a number of areas needing improvement in the Michigan program. The report is available on the federal Department of Health and Human Services website:

<http://www.acf.hhs.gov/programs/cb/cwrp/staterpt/index.htm>.

The Family Independence Agency will take the lead in developing the plan to deal with these issues. However, effective implementation will require cooperative efforts by the courts and other parties involved with the foster care system. In certain areas, the courts will have a significant role to play, particularly regarding the case review process.

Two items within the Case Review factor were rated as strengths: meeting the federal requirement of periodic review at least once every 6 months; and providing a process for termination of parental rights proceedings in accordance with ASFA.

Michigan was rated as needing improvement in three areas. The first involves temporary wards and the requirement that each child has an appropriate written case plan. The federal review concluded that despite Michigan's policy requirements for preparation of such plans, they were not being developed in many cases. Further, it found that case plans were not being consistently developed jointly with the children and parents. Often plans are not signed by the parents. Fathers, particularly, are not engaged in treatment planning. Case plans are often generic and do not address individualized family needs. Appropriate case plans developed early in the process can insure that there are fewer obstacles to permanency later.

Michigan was also cited as needing improvement in providing a process to ensure that a permanency planning hearing is held at least every 12 months. The review found that the requirement was met in only 59 percent of the cases. The scheduling of these hearings is the duty of the court. Further, it said that the "consistency with which the reviews are completed is variable." Specifically, it said that the focus of the hearings is not always on advancing permanency.

The third area needing improvement was providing a process for foster parents, preadoptive parents, and relative care givers to be notified of and have the opportunity to be heard at review hearings. The review summary explained that there is a statutory requirement for such notices, but said:

“This item was assigned a rating of Area Needing Improvement because the findings of the review indicate an inconsistent notification of foster parents, preadoptive parents and relative care givers due in part to a lack of clarity regarding the responsibilities and process for notifying these parties.”

Involvement of Relatives in Process

The whole subject of involving relatives in abuse and neglect proceedings is a complicated one that requires continuing attention. It is often important to involve relatives early in the case; when they seek to become involved later, it can be disruptive to the case plan that has been put in place for the child. On the other hand, there are cases in which for various reasons relatives may not be a good choice for initial placement. Sometimes placement of the child with relatives can reduce the incentive of the parent to cooperate with the case plan. Or, if the relatives live far from the parents, they might ultimately be suitable as adoptive parents, but initial placement with them would be inappropriate because the distance would interfere with the efforts of the parents to comply with the case plan.

Another legitimate concern arises with respect to placing the child with the very grandparents who raised the abusive parent. Those grandparents may not be willing to believe that the parent is abusive and may thwart treatment efforts with the parent or may improperly allow the parent unsupervised access to the child. The parent often learned parenting skills from the grandparent. Consequently, the same circumstances that required removal of the child from the parental home may well be present in the grandparents' home.

It also appears that there is a gap in the statutes and rules that may inappropriately limit participation by relatives. If a relative disagrees with the placement of a child in foster care, there does not appear to be an early administrative or judicial procedure available to seek review of the decision. This contrasts with the ability of relatives to intervene later, after termination, to file a petition for adoption, to request placement, or to challenge a placement decision by the Michigan Children's Institute Superintendent regarding adoption. However, that concern must be tempered with the recognition that

allowing further appeals of such decisions has the potential for prolonging litigation and delaying measures to implement a permanent living situation for the children.

Case Processing Delays

As the federal study revealed, there are a few areas in which the failure to meet case processing deadlines in the Family Division of Circuit Court inappropriately delays protective proceedings, leading to further delays in achieving the goal of permanency for the children involved. But even after a decision terminating parental rights, finalization of adoption can be substantially delayed by the appeal process, which is invoked in roughly 25 percent of termination cases. In 2002, the Court of Appeals average time for disposition by opinion of “dependency” (termination of parental rights and custody cases) was 321 days. The great majority of termination decisions are ultimately affirmed by the appellate courts, but adoptions cannot be finalized until the conclusion of the appellate process. Unlike the time a case is pending in the family court, during which efforts are being made to determine if the child can safely be returned home, the time the case spends in the appellate courts does not contribute to the evaluation of the best interests of the child. While due process requires the opportunity to appeal, time spent during the appeal can further disrupt the child’s life by postponing the day when a permanent living arrangement can be put in place.

RECOMMENDATIONS

Court Rule Changes

The significant amendments of the rules governing juvenile proceedings adopted by the Supreme Court effective May 1, 2003 have dealt with a number of procedural problems facing the courts. See new Michigan Court Rules subchapter 3.900. However, the work group concluded that several other possible changes would also be desirable.

A. Encouraging Filing of Termination Petition in Less than 42 days.

The court rules provide that under certain circumstances the court is to direct FIA to file a petition for termination of parental rights. The rule refers to the petition being filed within 42 days. In some cases, FIA may need a significant amount of time to prepare the petition. But that is not always the case, particularly where it has already formulated the recommendation to terminate. The work group recommends that MCR

3.976(E)(2) be amended to eliminate the presumption that 42 days will be allowed, as follows:

- (2) Continuing Foster Care Pending Determination on Termination of Parental Rights. If the court determines at a permanency planning hearing that the child should not be returned home, it must order the agency to initiate proceedings, ~~no later than 42 days after the permanency planning hearing~~, to terminate parental rights, unless the agency demonstrates to the court and the court finds that it is clearly not in the best interests of the child to presently begin proceedings to terminate parental rights. The order must specify the time within which the petition must be filed, which may not be more than 42 days after the date of the order.

B. *Encouraging Shortened Interval Between Permanency Planning Hearings.*

The court rules require permanency planning hearings at intervals of not more than one year. This creates a tendency to simply set the next hearing that far in the future when the initial hearing does not result in a decision about a permanency plan. However, it will often be the case that after the permanency planning hearing it appears that some extra time is necessary, but that it is not necessary to wait a whole year to take the matter up again. MCR 3.976(B)(3) could be amended as follows to encourage earlier scheduling of hearings where appropriate:

- (3) Requirement of Annual Permanency Planning Hearings. During the continuation of foster care, the court must hold permanency planning hearings beginning no later than one year after the initial permanency planning hearing. The interval between permanency planning hearings is within the discretion of the court as appropriate to the circumstances of the case, but must not exceed 12 months. The court may combine the permanency planning hearing with a dispositional review hearing.

C. *Scheduling Priority.*

Termination of parental rights cases are among the most urgent matters considered by our courts. The appellate rules provide for expediting such cases [see MCR 7.213(C)], but there is no provision giving such cases priority in the trial court. The work group recommends doing so. This would be particularly helpful in attempting to avoid trying these matters on a piece-meal basis. It recommends adding a new subrule to MCR

3.977(C), as follows:

(C) Notice; Priority.

- (1) Notice must be given as provided in MCR 3.920 and MCR 3.921(B)(3).
- (2) Hearings on petitions seeking termination of parental rights shall be given the highest possible priority consistent with the orderly conduct of the court's caseload.

D. *Early Identification of Parents/Relatives/Interested Parties.*

MCL 722.954a(2) requires FIA to make inquiries about relatives who might be able to provide care. However, there is no requirement that the court do so. The work group recommends including such a requirement at the first appearance of the parent, as the court might be more successful in getting the information.

Second, it should be clear that the inquiry should specifically address the identity of the father of the child, if that does not already appear.

Third, there are some circumstances in which notice to the child's doctor is required. See MCL 712A.18f(6), (7). In those cases, there should be an inquiry regarding the doctor's identity.

Some of these suggestions would be addressed by adding a new subrule provision in MCR 3.965(B), governing procedure at the preliminary hearing:

- (X) The court must inquire of the parent, guardian, or legal custodian regarding the identity of relatives of the child who might be available to provide care. If the father of the child has not been identified, the court must inquire of the mother regarding the identity and whereabouts of the father.

The other suggestions could be implemented with the following change in MCR 3.965(E):

- (E) Advice; Initial Service Plan. If placement is ordered, the court must, orally or in writing, inform the parties:

(1) - (4) [Unchanged.]

The court shall direct the agency to identify, locate, and consult with relatives to determine if placement with a relative would be in the child's best interests, as required by MCL 722.954a(2). In a case to which MCL 722A.18f(6) applies, the court shall require the agency to provide the name and address of the child's attending physician of record or primary care physician.

E. *Ensuring Participation of Interested Parties at Review Hearings.*

One of the criticisms of the Michigan system in the federal Child and Family Service Review was inadequate participation of interested parties in review hearings. The newly adopted rules provide that the court "shall consider" the oral or written statements of the interested parties. MCR 3.975(E); 3.976(D)(2). To further encourage their participation, the work group considered the suggestion that the court affirmatively ask for their input. The work group, however, saw this as creating a tension between the right of interested parties to provide information and the right of others not to be surprised by information revealed for the first time at the hearing.

Thus, it does not recommend changing the language regarding the conduct of the hearings, as that would encourage people to bring up new matters, possibly forcing adjournment of the hearing. But it does recommend court rule amendments to provide that information an interested party would like considered at the hearing should be provided to the court, the caseworker, or the attorney for a party. The language could be added to the notice of hearing provisions of MCR 3.975(B) (dispositional review hearings) and 3.976(C) (permanency planning hearings), as follows:

- (B) Notice. The court shall ensure that written notice of a dispositional review hearing is given to the appropriate persons in accordance with MCR 3.920 and MCR 3.921(B)(2). The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties.

* * *

- (C) Notice. Written notice of a permanency planning hearing must be given as provided in MCR 3.920 and MCR 3.921(B)(2). The notice

must include a brief statement of the purpose of the hearing, and must include a notice that the hearing may result in further proceedings to terminate parental rights. The notice must inform the parties of their opportunity to participate in the hearing and that any information they wish to provide should be submitted in advance to the court, the agency, the lawyer-guardian ad litem for the child, or an attorney for one of the parties.

F. *Controlling Substitution of Attorneys for Children.*

One often-expressed concern is that there are very frequent substitutions of lawyer-guardians ad litem for children. Sometimes the substitutes are insufficiently prepared to effectively represent the children's interests and to assist the court. There was a provision governing such substitutions in the former court rule, MCR 5.915(B)(2)(d), but it was not carried forward in new MCR 3.915. The work group recommends restoring a slightly modified version of the former provision in MCR 3.915(D), as follows:

(D) Duration.

- (1) An attorney retained by a party may withdraw only on order of the court.
- (2) An attorney or lawyer-guardian ad litem appointed by the court to represent a party shall serve until discharged by the court. The court may permit another attorney to temporarily substitute for the child's lawyer-guardian ad litem at a hearing, if that would prevent the hearing from being adjourned, or for other good cause. Such a substitute attorney must be familiar with the case and, for hearings other than a preliminary hearing or emergency removal hearing, must review the agency case file and consult with the foster parents and caseworker prior to the hearing unless the child's lawyer-guardian ad litem has done so and communicated that information to the substitute attorney. The court shall inquire on the record whether the attorneys have complied with the requirements of this subrule.

In addition, there are concerns that lawyer-guardians ad litem are not fulfilling their statutory duties to visit the children they represent. While there may be hearings for

which such a visit is unnecessary, or where telephone or other contact is sufficient, the work group concluded that a provision should be added requiring the court to inquire about the attorney's contact with the child. Such a provision could be placed in MCR 3.915(B)(2)(a):

- (a) The court must appoint a lawyer-guardian ad litem to represent the child at every hearing, including the preliminary hearing. The child may not waive the assistance of a lawyer-guardian ad litem. The duties of the lawyer-guardian ad litem are as provided by MCL 712A.17d. At each hearing, the court shall inquire whether the lawyer-guardian ad litem has met with the child, as required by MCL 712A.17d(1)(d).

Improved Reporting Requirements

MCL 712A.22 requires the State Court Administrative Office to publish an annual report regarding each court's compliance with the provisions designed to achieve permanency, including data on compliance with time requirements. That has never been done. However, SCAO is implementing revised data reporting requirements that will capture the information necessary to compile those reports. These will provide an important tool for SCAO and the Supreme Court to monitor compliance with federal and state statutory requirements for case processing. The work group supports that effort and urges trial courts to fully comply with the new reporting guidelines.

Cooperation with FIA Program Improvement Plan

As discussed earlier, the Report of the Michigan Child and Family Services Review by the U.S. Department of Health and Human Services has been issued. That study identified a number of deficiencies in the Michigan system. Unless they are remedied, Michigan could lose a significant amount of federal funding for its programs. The deficiencies are addressed in a Program Improvement Plan submitted to the federal agency by the Family Independence Agency. Many of the improvements are largely within FIA's control, but the Family Division of the Circuit Court will also be asked to improve the process. The plan has not received final approval, but is expected to include measures designed to promote timely and meaningful permanency planning hearings, increased participation by interested parties in review hearings, and early location of absent parents and identification of relatives who might help care for children. An Absent Parent Protocol has been developed and will be distributed soon to help develop procedures for identifying absent parents and relatives. The work group urges

the courts and FIA to cooperate in implementing the Program Improvement Plan once it is finalized.

Education and Training Programs

Many of the problems that arise in child protective cases are not amenable to structural solutions through court rules or statutes. Much of what needs to be done is an education effort to help courts and judges comply with current provisions and use good judgment in handling cases. Several avenues should be used.

First, judges and court staffs should take advantage of several upcoming Michigan Judicial Institute Programs and publications. This fall, MJJ will conduct training programs on both adoption and the lawyer-guardian ad litem function.

MJJ has recently published a lawyer-guardian ad litem handbook and a revised adoption bench book. Substantial revisions of the protective proceedings bench book are also underway. The MJJ bench books are an invaluable resource, and the adoption volume, which will be used as the materials for the upcoming adoption seminar, and the revised protective proceedings bench book, will be major tools to promote good practice. MJJ should be encouraged to provide, and courts to utilize, such programs and publications.

In addition, the group felt that a more targeted approach could also be useful. There should be an ongoing effort to distribute information to family division judges and staff regarding new developments in child protection law and procedure. For example, this work group arranged the distribution of a summary of the findings of the federal review of the Michigan program. SCAO, through MJJ or one of its other departments, should undertake the distribution of such information.

Public Outreach to Promote Adoption

While significant number of children in foster care are adopted each year, the great majority are adopted by relatives (in 2002, 37 percent) or by the foster parent(s) (54 percent). One of the continuing challenges is to bring additional prospective adoptive parents into the process. Plans are underway to encourage and assist individual courts to open the adoption finalization hearing to the public and the press to recognize National Adoption Day by celebrating Michigan Adoption Day. To that end, local family courts and FIA county offices are being encouraged to participate in a statewide "Adoption Day" set for November 25; the goal is to educate the public about the adoption process

and the number of children available for adoption.

Appellate Delay Reduction Initiatives

The work group endorses the proposals by the Dependency Appeals Work Group of the Court of Appeals for rule changes to speed up the process of appeal in termination of parental rights cases. Those changes, which the Supreme Court published for comment on July 15, 2003, would shorten the time for requesting appointment of an attorney to pursue an appeal, and would treat the order appointing an attorney as the claim of appeal, shortening the total processing time for such cases. The proposed amendments can be viewed at

<http://courts.michigan.gov/supremecourt/Resources/Administrative/2003-25.pdf>.

The Court of Appeals also has revised its internal procedures for handling such cases, which should further shorten the time required for reaching a final decision. Similarly, the Supreme Court has recently amended the rules governing appeals to that Court to eliminate delayed appeals, which will produce additional delay reduction in cases appealed to the Supreme Court.

The work group applauds these efforts and supports the proposed rule changes regarding appeals to the Court of Appeals. It also recommends further study of innovative proposals for expediting the appellate process, for example, considering use of video recording of proceedings as the official record on appeal.

Fostering Inter-Agency Cooperation

The creation of this work group including representatives of the judiciary and FIA was an important step in bringing together two of the major participants in the foster care/adoption process. If the group's discussions demonstrated nothing else, it is that a comprehensive attack on the problems facing the foster care system requires cooperative and coordinated efforts of all the groups concerned. Chief Justice Corrigan and FIA Director Bowler have continued to meet on a regular basis and have established joint committees to address specific aspects of these problems. Those efforts are to be applauded and encouraged. Other agencies, such as prosecuting attorneys, private social service agencies, and others should also be involved.

Developing and Considering Innovative Solutions

All of those involved in the process must remain open to new ideas and re-examination of past practices where improvements can be made. For example, the respective roles of the courts and FIA in supervising placement of children, licensing of foster homes, etc., is a difficult area, in which changes might be desirable. The issues are complicated by the relationship to federal statutes and funding. Nevertheless, all participants should remain open to change where it is shown that we can improve the system to better serve Michigan's families and children.

Similarly, the current adoption statute allows a petition for adoption to be filed in the county where the child is found or where the prospective adoptive parents reside. MCL 710.24. This can lead to petitions being filed in more than one county, with the potential for conflicting decisions. The work group recommends that consideration be given to statutory changes providing that the court that terminated parental rights is the one in which the petition should be filed, with the possibility of a change of venue being granted where there is good reason for the case to proceed in another county. But it recognizes that this is a complicated subject, and that the differing situations in various parts of the state would need to be taken into account. Further, the statutory procedure for hearings in disputed adoption cases, see MCL 710.45, should be re-examined to assure that all interested parties receive notice and opportunity to be heard.